EXHIBIT 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SECURITIES and EXCHANGE COMMISSION,

Plaintiff,

v. 20 Civ. 10832 (AT)(SN)
Remote Proceeding

RIPPLE LABS, INC., et al.,

Defendants.

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New York, N.Y.
July 15, 2021
3:00 p.m.

Before:

HON. SARAH NETBURN,

U.S. Magistrate Judge

APPEARANCES

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(Case called; The Court and all parties appearing telephonically)

THE DEPUTY CLERK: Starting with plaintiff Securities and Exchange Commission, could you please state your appearances for the record?

MS. STEWART: Good afternoon, your Honor. This is Ladan Stewart for the SEC. On the line today from the SEC are Jorge Tenreiro, Mark Sylvester, Ben Hanauer, Daphna Waxman, and John Daniels.

THE COURT: Thank you. Good afternoon.

Who do we have on behalf of Ripple Labs?

MR. RAPAWY: This is Gregory Rapawy for defendant Ripple Labs, your Honor. With me on the line is Reid Figel, and I believe some additional appearances have been provided to the court reporter.

THE COURT: Thank you. Anybody else on behalf of Ripple Labs want to state their appearance if they intend to be speaking? Mr. Ceresney, my notes suggest that you might be speaking. OK.

And on behalf of Mr. Larsen.

MR. FLUMENBAUM: On behalf of Mr. Larsen this is Marty Flumenbaum from Paul, Weiss, Rifkind, Wharton & Garrison. With me on the line are Mike Gertzman, Kristina Bunting and Justin Ward.

THE COURT: Thank you. Good afternoon.

And on behalf of Mr. Garlinghouse?

MR. SOLOMON: Good afternoon, your Honor. It is Matthew Solomon on behalf of Mr. Garlinghouse, and with me on the line are Nicole Tatz, Sam Levander, Alexander Janghorbani and Nowell Bamberger.

THE COURT: Thank you.

Good afternoon to everyone. I hope everybody is healthy and safe. We are continuing to conduct these proceedings remotely by telephone because of the pandemic. I want to remind everybody that for those people who are calling in from the public, that it is a violation of the Court's orders and rules and practices to record or rebroadcast any portion of today's proceeding. I know that that has been a problem in the past and we continue to investigate that, but it is in fact unlawful to record and rebroadcast the proceedings. So, I will direct everyone that they are not permitted to do so and that if we learn that today's proceeding has in fact been recorded and rebroadcasted, that we will notify United States Marshal's service who will conduct an investigation.

We have a court reporter on the line. I mention that for a number of reasons. First, she will be in charge of creating an official record which she will create and will publish. And, for the lawyers, just a reminder that each and every time you speak, if you can state your name clearly so that the court reporter can attribute your statements to you.

And, please, make every effort both to speak slowly, especially if you are going to be reading anything, please, speak slowly. And, also, just be sensitive to other speakers so that we don't have people speaking over one another. Those are the housekeeping matters for today.

So, we are here on an application from the SEC, it was filed on June 24th, I have that letter seeking to quash the subpoena served on the former director of the Division of Corporation Finance, Mr. Hinman, and I have the opposition to that letter application filed on July 1st by the defendants, and the SEC's reply letter filed on July 8th, all of which I have read.

So, this is the SEC's application so why don't I turn first to Ms. Stewart.

MS. STEWART: Yes. Thank you, your Honor.

THE COURT: Go ahead.

MS. STEWART: The exceptional circumstances doctrine articulated by *Lederman* goes back 80 years. There are very important tactical and policy reasons behind this doctrine and why it has held up for 80 years. With government resources already scarce and the government already having to compete with private industry for qualified individuals who are willing to serve the public, it is important that public officials be able to do the job the public needs them to do. But, if public officials are spending their time testifying in every

government enforcement action in which they had any involvement, and doing so years after they leave public office, there will be two important chilling effects as the cases we cite in our papers have noted.

First, these officials will be less likely to engage in open deliberations within their agencies if they think they will be likely to have to testify about every such deliberation. And, relatedly, and just as importantly, they will be less likely to engage with the public, whether it is through speeches, conferences, or informal meetings with market participants. These types of interactions are important to the functioning of many government agencies including the SEC. Again, if these officials have to fear being called to testify about every such interaction, they'll be less likely to engage in them.

The second chilling effect, which is also important, would be the very retention of qualified individuals to serve in these roles. As your Honor noted in the 911 case that we cite in our papers, subjecting former officials' decision-making processes to judicial scrutiny and the possibility of continued participation in lawsuits years after leaving public office would serve as a significant deterrent to qualified candidates for public service. Again, this is an equally important consideration. The government needs qualified people and depositions -- like the one defendants are

after -- deters qualified candidates from serving the public.

Now, defendants dismiss these points as a parade of horribles but this is not some abstract thing, it is a very real issue. This is not the first time a defendant in an SEC enforcement action has tried to depose an SEC division director. The defendants in *SEC V. Kik* tried to depose Director Mr. Hinman himself and Judge Hellerstein quashed their efforts. The defendants in *SEC v. Navellier* tried to depose the then director enforcement at the SEC and the district court in Massachusetts quashed that subpoena as well.

The SEC is not aware of any case where a current or former SEC director was forced to testify and defendants have not come forward with any such case. So, if the Court allows this deposition to go forward not only would it be making new law but it would be opening the floodgates to many, many more such subpoenas in this case and beyond.

First, there is little doubt that defendants would seek to depose other current and former SEC officials including Former Chairman Jay Clayton whose firm is already subpoenaed for documents. In fact, of the 11 witnesses in Ripple's initial disclosures, four are current or former SEC officials including Director Hinman. And, the fact that the individual defendants have another 90-day discovery window means they'll have a second chance to try to depose additional SEC officials even if they don't do it in the current discovery period.

Second, a decision in this case allowing Director Hinman's deposition would also expose him and many other current and former SEC officials to serial depositions in current and future enforcement matters. I want to pause here to note something that your Honor mentioned in the 911 case that I mentioned a minute ago. In that case, when your Honor was applying *Lederman* to former officials of a foreign government, one of the factors the Court noted in allowing those depositions to go forward was that there was "no likelihood of serial abusive litigation." That's on page 14 of your opinion. Here, by contrast, there is every likelihood of serial abuse of litigation against Director Hinman and against other SEC division directors and high-level officials and even SEC commissioners.

Third, the ripple effect of this serial abuse of litigation would not be limited to the SEC, it would almost certainly extend to other government agencies. There is little doubt that a decision by this Court to allow this deposition will be cited by dozens if not hundreds of defendants in enforcement actions for years to come. This would expose countless government officials, them and their agencies, with dealing depositions instead of doling the people's work. And, it would chill agency deliberations both internally and with the public. And also importantly, as I mentioned, it would deter qualified individuals from joining public service.

Again, these aren't hypothetical or abstract issues, they're very, very real and their impact on the functioning of government would be very real.

So, this particular subpoena has to be viewed in light of these broader concerns. This is not just about Bill Hinman in this one litigation, this is about Bill Hinman and countless other SEC officials and countless other government officials in countless other litigations. This is serial and abusive, in your Honor's words.

When viewed from this broad lens, it is not difficult to understand the significant repercussions from the subpoena on the functioning of the SEC and other agencies and this is why the burden on defendants here is so high to show exceptional circumstances and they have not done that.

I will pause now, your Honor. I am happy, your Honor, to go through more detail on why we believe the burden has not been met on the specific topics that they seek to depose Mr. Hinman on but I wanted to pause to see if your Honor had any questions before I do that.

THE COURT: Thank you. I do.

I would like to focus on what I think is the biggest issue here which is the 2018 speech. I do think that that is a unique fact that probably doesn't present itself in every enforcement action that the SEC brings, though I do think your concerns about the effects of requiring Mr. Hinman to be

deposed are legitimate but I do want to focus on this speech. In part, I want to move to the next prong of the analysis and talk about how the government is defining the speech and what you think are the reasons why it would be inappropriate to require him to sit for the deposition and I will try and be a little bit more precise.

As I understand it, when Mr. Hinman gave that speech he stated clearly at the time that these were his own personal views and not the views of the SEC. So, I am wondering if you can help me reconcile what I perceive as tension between a speech that he gives as a senior person within the SEC but that he gives on his own behalf and expressing only his own views, and a view that his being asked to answer questions about that speech might somehow interfere with the deliberative process privilege.

MS. STEWART: Sure. I am happy to, your Honor. Again, this is Ladan Stewart for the SEC.

So, speaking more generally about the speech, the speech is publicly available on the SEC's website. The SEC doesn't contest its authenticity. Director Hinman notes in his declaration that he gave the speech so none of this is in dispute and the SEC is willing to stipulate to all of that, which is to say the speech is a speech.

Now, going to your Honor's specific question about possibly there being tension between Mr. Hinman having given

this speech in his personal capacity expressing his personal opinions and any deliberative process protection. So, respectfully, your Honor, we don't think that any such tension exists. Director Hinman, and any SEC official who makes public remarks, included in the process of crafting those remarks are deliberations within the agency. Here, as we have, we have already produced to defendants a privilege log showing the back and forth communications about drafts of Director Hinman's speech showing that the speech was reviewed by others within the Commission. At the time the speech was given the Commission had not expressed any position on whether Ether was a security or I should say whether offer and sales of Ether were securities. So, by definition, any discussion that Director Hinman was having with others at the Commission about the issues in his speech were pre-decisional and therefore deliberative process would apply and cover those communications. There is also --

THE COURT: Can I interrupt for one second? Sorry to interrupt you.

Pre-decisional suggests that there was then a decision made so what is the decision for which these communications would be pre-decisional?

MS. STEWART: So, I think the case law on deliberative process is actually pretty clear that there doesn't need to have been a decision made. A lot of times -- and I think the

Fish & Wildlife case that we cite talks about this. A lot of times there are deliberations with agencies that end up going nowhere so a final decision is not made but that doesn't move the deliberative process protection from the pre-decisional communication even if no final decision has been made.

I would add, your Honor, that we have an additional case that we did not cite in our letters and we found this case after we filed our letters and we apologize for not having included it but we think it goes to your precise question of whether Mr. Hinman's own opinions are covered by the deliberative process privilege and this case says that they are and the case is *SEC v. Nacchio* and the cite is 2009 Westlaw 211511, and this is a District of Colorado decision from January 29th of 2009.

Another thing I want to note here is that it is very routine and commonplace in the government for officials to give speeches, to speak at conferences, to teach CLE courses and the like, and so in this sense the speech that Director Hinman gave is not something that is unique. It happens all the time within the SEC and within other government agencies and, as Director Hinman did, officials at the SEC and other agencies routinely qualify their remarks by making sure that the audience understands that they reflect their own views and not the view of the Agency in order to ensure that the public is clear about who really is speaking because, as we told you in

prior letters and prior arguments, the SEC speaks in certain ways -- it speaks through enforcement actions, it speaks through no action letters, it speaks through very formal and particular ways and it cannot speak through the words of its staff even and even its commissioners.

THE COURT: Thank you.

Can you remind me what you are citing the *Nacchio* case for? For what proposition?

MS. STEWART: For the proposition that the deliberative process privilege would cover Director Hinman's personal opinions that he delivered in his speech. And, generally, it is a helpful case on deliberative process more generally and on speeches given by SEC officials but that goes directly to the question that your Honor raised.

THE COURT: Thank you. Anything further? Or I will turn to it Mr. Rapawy.

MS. STEWART: I am happy, your Honor, to talk about if there are any other parts of our letter that you have certain questions on but I would like to just really point out that when it comes to the information that defendants want to get from Mr. Hinman about sort of the deliberations around the speech, there really are major issues with this kind of exercise under *Lederman* and the case that we cite in our papers, the *SEC v. The Commission on Ways and Means* case is really on point there and it points out that *Morgan* and its

progeny make clear that exceptional circumstances, that the doctrine is premised on the notion that high-ranking officials should not be required to testify regarding their official decision making processes and that's exactly what defendants are trying to get from Director Hinman here, they're trying to get him to testify about the decision-making process of the SEC about the speech or about anything else that has to do with BitCoin, Ether, and that is just not exceptional circumstances under *Lederman* and it is precisely what *Lederman* and *Morgan* were trying to avoid. And related to that is that questions about this type of decision-making process are subject to the deliberative process privilege, as I mentioned a moment ago. At the time that Director Hinman gave his speech, the SEC had not made a final determination about the regulatory status of Ether so, as I mentioned, any such conversation would be pre-decisional under the Supreme Court precedent *Fish & Wildlife* and earlier cases.

So, you know, what really defendants are trying to do here is to question Mr. Hinman about protected, privileged information and defendants say, well, the SEC can object to protective privilege and then we can get a record and we can come back before the Court, but the point here is that deposing a senior government official about the agency's deliberate process is not an exceptional circumstance that justifies that deposition. We are not here asking the Court to rule on the

privilege issues but, practically speaking, defendants wouldn't get information from Director Hinman that they can't get and have not already gotten from the SEC as I mentioned threw our priv log logs that we have already provided to them and they're not going to be able to get information beyond that in a deposition, information beyond who Director Hinman spoke to and the date of that conversation because the SEC will object to any attempt to get into the substance of those discussions.

So, this is sort of a practical point but it also goes to the larger question of it cannot be an exceptional circumstance to depose a government official to test the contour of the agency's privilege especially when there are many other avenues open to defendants to do so.

So, with that I will stop, but I'm happy to answer questions and any other points in our letters that your Honor has.

THE COURT: I do have a question. Do you believe the deliberative process privilege would be invoked or at play if Mr. Hinman was deposed and asked questions like: *Why do you think Ether doesn't fall into the definition of investment contract? Why do you think this?* Do you think that would invoke the deliberative process privilege and, if so, why?

MS. STEWART: This is Ladan Stewart again.

Yes. Absolutely, your Honor. We think that those types of questions would invoke the SEC's deliberative process.

It is difficult to imagine that Director Hinman would be able to answer those types of questions without invoking information that he learned from other SEC personnel in a kind of pre-decisional and deliberative setting. There were conversations, all types of communications among the SEC staff, SEC divisions about not just Ether but other digital assets. And so, while his final opinion on that as he reflected in his speech in 2018 may be public, again, the speech is what it is. His opinion is what it is, it is already reflected in his speech. But, a defendant would not be able to get anything beyond that from him on his opinion or his discussions with other SEC officials about their opinions under the deliberative process privilege.

THE COURT: Thank you. Let me turn to defendant.

MR. RAPAWY: Thank you, your Honor. Gregory Rapawy for Ripple.

The SEC has failed to establish that it is entitled to the extraordinary relief of quashing a deposition subpoena directed to its former employee. And we do not believe we have any burden to show a special need for this deposition because this witness, Mr. William Hinman, was never at the apex of any governmental unit and, as of today, he has no governmental responsibilities at all. But if we did have to make that showing he does have firsthand knowledge of industry perceptions of digital assets and of their regulatory status

because he knows firsthand about the communication that he had with industry participants about whether digital assets were securities, and he also knows firsthand about communications in which we believe those industry participants expressed confusion as of 2018 about how the federal securities laws would or should apply to digital assets. And he has that personal knowledge because he spoke with people outside the agency both before and after he gave the speech -- to which your Honor referred, frequently referred to as the Hinman speech -- in June 2018 about how the federal securities laws apply to digital assets. And we think that the circumstances, the significance, and the impact of that speech are all directly relevant to the SEC's claims and to our defenses. We need to depose Mr. Hinman to develop the facts about perceptions in the marketplace that he was trying to respond to with his attempt to revise guidance in that speech. Whether he was successful in clarifying matters or not, that was clearly his intent.

In general --

THE COURT: Why do you say that was clearly his intent?

MR. RAPAWY: I think because that is a reasonable inference from the speech itself and also from the fact that the SEC later held it out to Congress -- the chairman said to Congress and said that the Agency has been transparent on its

application of the *Howey* criteria, the digital assets -- I am paraphrasing but the exact quote is in our letter. And I also think that when the Agency's Office of Investor Education points investors to the speech that is also a showing of the intent that the speech was to provide guidance, not to present his personal views in some kind of abstract academic context, not to just have fun talking about an interesting issue. It is an interesting issue but that's not why he was giving a speech. He was giving a speech because the industry was asking for guidance and he was providing it with, admittedly, a disclaimer that the SEC wasn't going to be bound by that guidance. But the existence of that --

THE COURT: If your view is that the speech reflects Agency guidance -- I think is what you just said -- then why wouldn't the discussions that led up to that speech be covered under the deliberative process privilege?

MR. RAPAWY: Well, I have two answers to that, your Honor. The first thing is we want to take this in steps in part to determine whether this speech was adopted or approved by the SEC. Now, they have denied that. It is a contested issue, a contested factual issue in this case whether this speech was ever adopted or approved by the SEC and we would like to establish that one way or the other. If it was, then that really heightens the impact of that speech for Ripple's fair notice event and for the individual's state of mind -- not

defenses exactly but contesting the SEC's ability to prove their state of mind at trial. On the other hand, if it was only his personal views, as the SEC contends then, as your Honor suggested, we can still explore facts about this speech that wouldn't be covered by deliberate process and we can use it as evidence to what was thought about the status of the digital assets in 2018. Either way, whichever way that ultimate question comes down, there are relevant non-privileged questions that we can ask. And to the extent that there are any privilege issues to be raised in this case, I think that they need to be decided on the record that would be created by the deposition itself.

Now, *Nacchio*, as Ms. Stewart pointed out, was not cited in the papers but I tried to pull it up really quickly and I haven't had a chance to read through it fully, but it does appear that the deposition did take in *Nacchio* and they raised the deliberative process question on a question-by-question basis and then the Court considered those questions on the record that had been made at the deposition which is exactly the process that we propose should be followed here.

And I will also -- I am jumping ahead a little bit but I also think that the SEC conceded in its reply that the communications with third-parties, which are a big part of what we are interested in in this case, would not themselves be

privileged. That's on page 4 of their letter. Communications with third-parties they described as a non-privileged area of inquiry. So, that at least we can ask him; we think it is relevant, highly material, and something of which he has personal knowledge.

I would like to touch on the legal questions relating to whether he qualifies as high-ranking or official in the first place. I know your Honor is familiar with the law in this area, but as we see the case, there is no dispute that Mr. Hinman was never at the apex of the SEC. He headed a division within the SEC, one of six divisions in the SEC, and he was less senior than the chairman, less senior than the four other commissioners and a peer of, depending on how you count, a dozen or two dozen other people. And there are no that many officials at the apex of a governmental unit. And with respect to Mr. Hinman specifically, the Division of Corporate Finance undoubtedly does important work, he had about 400 people reporting to him, the SEC as a whole had about 4,200 employees. A person who supervises one tenth of the agency's work force is not at the agency's apex and we submit that's the test.

We don't agree that the analysis should proceed at the level of a subdepartment or a subdivision of an agency. That is not how the Court applied the test in the *Ways & Means* case which is cited in the papers where the individual was the director of a staff or subcommittee but not high-ranking

official in the context of Congress which was the relevant governmental unit.

It is also not how the Court applied the test in the terrorist attack case where the Court asked whether the individuals were high-ranking -- ambassadors count as high-ranking and ministers count as high-ranking but the cultural attache for Saudi Arabia to the United States who runs a subdivision of the embassy of Saudi Arabia to the United States -- the Saudi Arabian Cultural Mission -- was not high ranking.

So, we think that those cases are the best reasoned authority on this subject and they support our view that you look at the status within the agency as a whole rather than the status within a sub.

I also want to emphasize the point that Mr. Hinman is also a former rather than a current SEC official and that is not dispositive. Former officials get some protection but it is significant, and to the extent that the Court is doing any kind of balancing or weighing of interest, we think it is very important. You will not be distracted from any current duties he is performing on behalf of the public. He has no current duties on behalf of the public. The only policy -- and, by the way, he has not moved to quash his subpoena in his personal capacity so undue burden on him as individual witness is also not before the Court. The only burden that is really

cognizable in this context is the attenuated concern that if this sort of thing became routine it would be a problem getting qualified people to serve. And that's certainly a factor that Courts have considered but we do think this is an unusual and exceptional case and we don't think it is run of the mill and we don't think that a decision requiring him to testify would cause anyone who was thinking about whether to take the job of SEC division director would think, *Gosh, if I do this and I give a really important speech, someone might want to ask me questions about it years later*. I don't think that's a plausible scenario in which the government has legitimate interests that are at stake.

Going to the question of firsthand knowledge, because although I think that, as your Honor sort of suggested that the Hinman speech was the crux of the personal knowledge in this case but it is not the only thing we want to ask about, it is not the only thing that we have a basis to believe that Mr. Hinman has personal, relevant, unique firsthand knowledge of. We think that there are a number of situations leading up to but really for the entire year surrounding that June 2018 speech, I would put it from about March 2018 to March 2019, he had a number of communications with individuals in the marketplace where people are coming and we believe -- we don't know what happened because we haven't asked the questions yet -- we believe that they were either asking for guidance or

presenting their views to people in the marketplace as to inform players in the industry as to the status of these digital assets and those are relevant for multiple, several reasons. One is that if people are coming in and expressing widespread view in the industry that when you buy digital assets, a piece of code itself is not a contract or an investment contract, that that's relevant to how Ripple's XRP was held out in the marketplace which goes to the question of whether it was an investment contract under *Howey* or under the Securities Act generally.

Second, if those individuals were coming in and expressing confusion about whether and when digital assets could be regulated as securities, people said that and he remembers it, or he can tell us who the people were who came in and said to him that they were confused about these issues, then would be relevant both Ripple's fair notice defense and would also be relevant to the individual states of mind. Now, we have cited some examples of communications we wanted to ask about in the letter and those are under seal because they involve documents that the SEC designated as confidential.

I know I am talking a little fast here. I want to pause and ask if your Honor has any questions.

THE COURT: No, I'm following you.

MR. RAPAWY: OK.

So, but we did reach out to the SEC, we are going to

try to narrow those redactions and get something with more disclosure on the docket in the near future. They said that did they did not object to the disclosure of the individuals and entities that communicated with Mr. Hinman or the general subject matter of those conversations. So, on that basis, I want to point out the fact that leading up to that June 2018 speech he met personally with the founder of the Ethereum Foundation, and also with representatives of ConsenSys, a leading software development company for Ether. And so those, and we believe other conversations -- we don't know all of the conversations because we have not been able, through discovery, to get a complete list -- are among the matters that we think we would like to ask him about and that he has personal knowledge of. He was a focal point for these conversations in the industry in a way that no other individual was and I would like to sort of, on that point, to address the question couldn't we get it from the third-parties? Because I know that is a point that the SEC raised in its letter that is something that might be on your Honor's mind. And the answer is for some of them we can and we are trying, but we don't know who all the third-parties were. We believe he had more conversations with more people than we have been able to determine and he is the one person who can tell us which of those conversations happened, which of those conversations were substantive, and even to the extent that his own recollections of those

conversations were not relevant evidence -- and we believe they are -- we can then go on to seek further discovery from those third-parties and focus our efforts on the places where we can actually find this evidence that we need for our case.

THE COURT: On that, Mr. Rapawy, on that point, if you were coming to me and saying we need to depose this person because we need to know who he spoke to in these meetings, I would say to you there are definitely easier and less intrusive ways to get that information, presumably Mr. Hinman had a chief of staff or a deputy who participated in those meetings. I suspect knowing nothing about Mr. Hinman's practices but knowing something about how high-level government officials act, that he wasn't meeting with these people on his own; or you could get his calendar which, as a government official is almost certainly preserved, know who he is meeting with.

So, on that cause I don't know why that would be a basis in and of itself why that sort of information would justify a deposition.

MR. RAPAWY: Well, I don't know, your Honor, whether there was any one particular person who was with him in all of these conversations. We have just very recently, in fact last night, gotten a privilege log from the SEC that describes some communications that may have been relevant to these discussions that he had. So, I am not sure that it would be as easy to do as your Honor is suggesting but I take your point but there is

some of that that we can do through other means. I do think it is, insofar as you are weighing the equities as to this deposition as a whole, that the ability to ask him who he had these conversations with, conversations that he invited people to come in and have with him personally, he probably is the single best source of information for that and so I think it's at least a legitimate thing that we plan to get out of this deposition in addition to discussing specifically the speech with him.

I also think he is uniquely situated to help us develop the facts that will go to -- and I alluded to this point earlier -- whether the speech is, itself, ever was adopted or approved by the SEC which I think will significantly affect its admissibility at trial or on summary judgment and the probative weight that a fact finder would accord to it. I do think that we have accomplished some facts to support that so far, the fact that the chairman said it to Congress, the fact that the Office of Investor Education put it out there. But, that said, I think that this is going to be hotly contested and we need everything we can get and he is going to be a significant, firsthand, unique source of knowledge about the circumstances surrounding that speech and whether it was intended to be taken as the views of the Agency and because of his involvement in considerations after the speech whether it was received that way. Because I think it would be relevant to

the fair notice defense and to the individual states of mind if it was taken as guidance, if people told him they were understanding it as guidance even if he maintained, as a formal matter, that it was not the views of the agency.

Actually, I would like to make one further point on the question of what happens if the speech itself was the agency action or the agency decision, which is if the speech itself were the agency decision, it would still, communications after the speech would then be post-decisional and we can get discovery of post-decisional discussions under the deliberative process privilege doctrine as discussed I believe in the *Sears Roebuck* case that is cited in the *Fish & Wildlife* case. So, even if you were to assume for assume that is for purposes of analysis that it were a decision we could still have the conversations afterwards where people told him how the industry reacted to it.

I feel like I have covered most of the topics that I planned to address. I did want to say with regard to the *Fish & Wildlife* decision, in particular, that I think that case can be fairly read to say that the agency never has to reach a final decision. In that case there was a draft biological opinion, it never got to be a final biological opinion. I guess the agency decided not to issue a final biological opinion and the decisions leading up to the draft were still privileged but I don't think it permits what counsel for the

SEC, with respect, is trying to do here which is to say decisions are pre-decisional, if there is any possibility that the agency could someday make a decision, which they claim they hadn't as of 2020, therefore everything gets cloaked going back years because of the possibility that maybe someday they would say something about Ether that they admit is actually agency statement.

I do expect we will contest the applicability of the deliberative process privilege. I think that should be done on a full record after the deposition, as it was done in *Nacchio*. And, I also think that one thing one thing your Honor has not seen in their letters is any communication that the assertion of the deliberative process privilege has been authorized at the appropriate agency level, it has to be done by someone quite senior, and I would refer your Honor to the citations in our April 20th letter which is ECF No. 142 at page 4 on that point.

Finally, your Honor, I would like to spend a moment on the sort of general policy concerns that Ms. Stewart started with at the outset of her argument and the sort of uniqueness of this case.

This is not an ordinary case. This is a case where the SEC is asserting, in litigation for the first time, that a previously unregulated digital asset, that was in widespread commercial use for the last eight years, is and always was a

regulated security. And on that theory you destroy the value of promising technology imposed with retrospective penalties on my clients, on the individual defendants, and to cause massive losses to the XRP holders whose interests it is ostensibly seeking to protect. It is a very unusual set of facts and it is one that puts market perception and industry confusion about XRP and other digital assets for the SEC's claims and the core of our defenses in a unique way. And in unique cases, in highly unusual cases you do get, sometimes have depositions of the senior agency decision makers and people who inserted themselves into the process through which these unusual agency actions happened. And I am referring indirectly to the case involving the Secretary of Commerce and the decision by Judge Furman that I know your Honor is familiar with. And we have a very legitimate basis to ask Mr. Hinman, specifically and personally, about what he learned by acting as the focal point of communications about industry perceptions and market confusion as to whether digital assets were securities. He was responsible for speaking directly to the industry, to providing public guidance whether it was phrased as his own views or whether it was later adopted by the agency, and for attempting to clarify the SEC's position on an extremely confusing issue of law, issues of law and issues of facts. We think that the guidance that he gave in that speech that was either intended or understood, or both, protects our case in a number of ways.

Under those circumstances it is reasonable and proportionate for us to seek his deposition and we respectfully submit that it would prejudice our defense if we are completely denied the opportunity to do so as the SEC is attempting to do.

On that basis, I would ask that the motion be denied.

THE COURT: Thank you.

Do any of the counsel for the individual defendants wish to be heard?

MR. FLUMENBAUM: Your Honor, this is Mr. Flumenbaum for Mr. Larsen.

I agree with what Mr. Rapawy has stated. I want to point out the obvious inconsistency, the SEC's argument before you where they started out by saying that the speech reflects his own personal views. And the SEC's position is that it still hasn't determined whether Either and BitCoin are securities or currencies. Under those circumstances, deposition is a must. We must be able to ask him about what he stated, his other public remarks, and we will have to deal with the SEC's improper use of deliberative process to try to shield that but that should be done on a full record after his deposition. They are clearly taking an improper position with respect to deliberative process. They won't be able to make out the basis for asserting that privilege.

THE COURT: Thank you.

Ms. Stewart, can I ask one practical question? My

understanding is the deposition is noticed for Monday. If I am to authorize the deposition, is it still going forward on Monday?

MR. FLUMENBAUM: Yes.

MS. STEWART: Your Honor, we would need time to evaluate sort of our next steps in the event that your Honor chooses to allow the deposition to go forward but, yes, the parties had agreed on Monday as the sort of place holder date for the deposition.

THE COURT: OK. Thank you.

MR. FLUMENBAUM: The defendants are prepared to take his deposition on Monday. We have already adjourned it -- the original date -- in June.

THE COURT: Is that Mr. Flumenbaum speaking?

MR. FLUMENBAUM: Yes. I'm sorry.

And so, we had originally adjourned it after the SEC indicated that it was going to make the motion before your Honor but we do have a cutoff at the end of the month and it is very important to get this deposition in as promptly as possible.

MS. STEWART: Your Honor, can I make a couple of additional points? This is Ladan Stewart.

THE COURT: Yes.

MS. STEWART: If that's OK?

THE COURT: Please.

MS. STEWART: I just wanted to respond to a couple of the responses that Mr. Rapawy makes.

First off, it has become clear both from his comments and Mr. Flumenbaum's comments that what defendants are really after here are to depose Mr. Hinman twice. They want to depose him, they want us to sit for hours and go through questioning on the record and object to basically every question they ask about the speech, about his personal opinions about Ether, about his communications with agency officials and all of that. Then they want to bring that record to your Honor and then, if they succeed, they want to depose him again. And I submit to your Honor that that sort of litigation strategy is not an exceptional circumstance under *Lederman* and that the more appropriate avenue here would be to litigate these privilege issues, as defendants have already told your Honor they intend to do, which they can do on the basis of the privilege log that we have already provided and are continuing to provide this week and next week, and then we can litigate that issue before your Honor and if your Honor decides that there are not appropriate assertions of privilege, then Director Hinman could sit for a deposition. But to do that now, with this issue outstanding, with the motion to strike outstanding which is really the core of their wanting to depose Mr. Hinman is this fair notice defense which your Honor has already ruled is objective. So, it is hard to understand what a market

participants thought about Ether or BitCoin could be relevant to Ripple's fair notice defense. But, putting that relevance issue aside, with all of these outstanding issues, it is just difficult to understand why we need to expose Director Hinman to this deposition right now. The discovery window does not end until the end of August, there is an additional 90-day discovery window for the individual defendants' case. There is just simply no reason that this decision needs to be made right now on this record.

The other point that I wanted to make was, just so we are clear --

THE COURT: Can I just interrupt you? Sorry, Ms. Stewart, just to interrupt for one moment?

You raised the *Nacchio* case, which is a 12-year-old case, 11-year-old case, and we scrambled to find it. It looks like, based on Mr. Rapawy's quick read, based on my quick read, based on my law clerk's quick read in the middle of a court conference that in that case, which you thought was persuasive, that deposition happened and then there was judicial ruling on the privilege assertion. So, are you suggesting that *Nacchio* is not a kind of precedent that you want me to look to as guidance for how to handle this dispute?

MS. STEWART: No, your Honor. *Nacchio* involved a more junior SEC official so *Lederman* was not an issue as far as I understand in that case. It was not the kind of case where

there was dispute about whether it was appropriate under *Morgan* and *Lederman* to depose that individual so that case is really about deliberative process privilege and not about the larger issue of whether a high-level official of the SEC should be deposed and that was the proposition for which we were using it today.

THE COURT: Continue.

MS. STEWART: Thank you. This is Ladan Stewart again.

I just wanted to make a couple of other quick points about the third-party communications that Mr. Rapawy spent a lot of time talking about. You know, as your Honor pointed out, there are other ways to get this information and, in fact, defendants already have this information. We have produced documents, we have produced calendar entries, we will continue to produce any relevant documents. We have provided interrogatory responses with this information. There just is no basis for defendant to say that we think there are conversation that we don't know about because they have the documents. And, as I mentioned, it is also the case that these communications that they're having that -- I'm sorry -- that these types of third-party communications can't go to the objective test that your Honor has already talked about for the fair notice defense.

And one thing that I just wanted to point out that I thought was interesting as I was going back through the

transcript of our April 6 conference was your Honor asked a question in that conference about if the SEC has made this public announcement through this speech by Director Hinman about Ether, then why is it that conversations that Director Hinman or anyone at the SEC may be having with third-party folks after that is even relevant.

Your Honor said: *So, my question to you is after the public announcement in whatever fashion and in whatever opaque way was made, after that announcement, why would it matter what they were saying about those assets if the market now had that information and would act accordingly?* This is on page 30 of the transcript. And Mr. Kellogg responded that the reason that this was relevant was because there may have been conversations about XRP and that's why this mattered even after the Ether speech. Now, here, Director Hinman has already said in his declaration that he had no conversations with market participants about XRP. So, it sort of goes to show that there really is nothing here. There is nothing here that is relevant and in light of that it just cannot be that under the circumstances, in light of the chilling effects and all of the issues that we have talked about, that this can possibly rise to the exceptional circumstances that's required under *Morgan* and *Lederman*.

I am happy to answer any more questions but there is nothing else at this time.

MR. FLUMENBAUM: Your Honor, this Mr. Flumenbaum.

I would just like to make one comment. We don't intend on asking questions in which the deliberative process privilege should properly be applied. There are hours of depositions from Mr. Hinman based on specific public statements that he made and specific meetings that he made. As Mr. Rapawy said, he met with the principles of Ether one week before his speech. That is not deliberative process what was said during those meetings. And he should answer that question. *What was he told about Ether? What was he told about centralization?* Those are proper questions that could be asked of him and what the SEC is trying do is prevent any discussion of any of the background, any of his understanding at the time that he made his statements and the meaning of those statements. And that's just inappropriate. There is plenty to depose him on, I am sure they'll invoke the deliberative process where they think it is appropriate and I hope they do it only where it is appropriate but, if they don't, we will come back and challenge that but there is no basis to prevent his deposition on that basis at all.

MS. STEWART: Your Honor, this Ladan Stewart. If I may for just one moment? I'm sorry. One moment. I apologize, your Honor, this is Ladan Stewart again.

What Mr. Flumenbaum says goes directly to the point I was trying to make earlier which is that the conversations that

Director Hinman is having with third-parties, they already know who the third-parties are and they can ask those third-parties. There is no reason to depose Director Hinman to ask those questions. And, again, I want to emphasize, anything to do with the speech in terms of the intent of the speech, the reasons Director Hinman gave the speech, discussions he had about the speech, those, we contend, are all covered by the deliberative process privilege. So, if this deposition does go forward, we will instruct Director Hinman not to answer those questions. So, I don't think that Mr. Flumenbaum is going to get the information that he now says he is going to get about the speech. Again, the speech is the speech. Anything beyond that is privileged.

Thank you, your Honor.

MR. RAPAWY: Your Honor, this is Gregory Rapawy. May I very briefly? I know there has been a lot of colloquy. We do object --

THE COURT: Briefly.

MR. RAPAWY: Briefly.

We do object to pushing the speech out in time. There is an August 31st deadline.

THE COURT: You mean the deposition?

MR. RAPAWY: Yes. Excuse me. I do mean the deposition. Too much talking about the speech.

We want to be able to do follow-up after the

deposition and we really also feel that our client would be prejudiced if discovery was extended again; it has already been extended once over our deposition. I do think it should be possible to avoid two depositions here if the privilege objections are limited to reasonable scope. We certainly don't intend to provoke two depositions. We may get two if there are blanket objections but we hope to avoid that.

That's all I have.

THE COURT: OK.

MR. SOLOMON: Your Honor, I'm sorry. It is Matthew Solomon for Mr. Garlinghouse. I had one point that I would like to make, if I may, and I will be very brief.

THE COURT: Go ahead.

MR. SOLOMON: I wasn't going to make this point the first time Ms. Stewart said it but she has now said it twice to you, that the individual defendants have an additional 120-day discovery period. After the motions to dismiss are decided we don't think we will need it because we think they will be granted but that is neither here nor there are in terms of instant discovery period. In fact, the SEC only agreed to that additional discovery period if we could not rely on it to avoid discovery on issues that are relevant now. That's why my client and Mr. Larsen will be sitting for depositions during this discovery period.

So, the notion that we are somehow pulling a fast one

and trying to push discovery now when we have the second bite at the apple is based on a false premise. The entire reason we got that discovery was only because the SEC said we couldn't delay anything, nor should they now be able to delay taking a deposition that is clearly relevant -- I think we established today -- of former Director Hinman to avoid discovery on these issues.

Thank you, your Honor.

THE COURT: Thank you.

Thank you, all, for your excellent argument, as always. I think the issues remain complicated. I am going to rule in part. For the purposes of this dispute I am prepared to find that Mr. Hinman was a high-ranking official. He held the head of one of the SEC's significant -- one of six divisions and commanded significant authority and held substantial responsibility within a very important federal agency. So, on the facts here I do believe that he is entitled to the standard that is set forth in the *Lederman* case, 731 F.3d 199. I recognize that he is a former official and under the *Moriah* case that is certainly a factor that I considered in thinking about how to rule here.

This is not a run-of-the-mill SEC enforcement case. As Mr. Rapawy noted when he was speaking on this particular issue, this case is I think separate and part from the standard cases that the SEC brings and I do not believe that authorizing

Mr. Hinman's deposition is going to open the floodgates and serve as a basis for any defendant in an SEC enforcement action to seek the depositions of heads of divisions. And I expressly find that this case is unique, that the nature of the case involves significant policy decisions in our markets and that the amount in controversy also is substantial and that the public's interest in resolution of this case is also quite significant. So, I think that this case is not a basis for future cases and future judges to find that a deposition is appropriate in all instances but I do think in this case Mr. Hinman, given the speech, must sit for a deposition. So, I am going to authorize his deposition.

There is a separate question about this issue of privilege and I am very much not disposed to allowing or requiring, I should say, Mr. Hinman to sit twice. And given the issues that have been raised today, I think there are a couple of ways we can go forward. Defendants are keen to take this deposition on Monday -- which is why we are holding this conference today -- and have suggested that they believe that there is significant territory to cover where they do not believing the privilege will be invoked. Ms. Stewart seems to think otherwise and has suggested, not impermissibly, but has suggested she is going to direct Mr. Hinman not to answer wide swaths of questioning and assert the deliberative process privilege. It seems to me there are a couple of ways we can

proceed here:

First, we can go forward with the deposition on Monday and a record can be created and the parties can come back to me if they would like. Everybody is on notice that I am very much disinclined right now, given what we are talking about, to require Mr. Hinman to sit twice.

The second way we can proceed is to have the parties try and work out some sort of agreement between them about the scope of the deposition and if they can't reach agreement, to come back to me on specific questions -- I don't want specific deposition questions but specific areas of questioning and get a ruling from me on what areas would be protected and what areas would not. I am sensitive to the defendant's interest in moving the case forward, I know that the SEC shared that interest as well. It seems to me that putting the deposition off for a week and thinking a little bit more about how the privilege might apply probably is a good idea and I guess I say that with the hopes that the parties can have a conversation maybe tomorrow and let me know how they would like to proceed. But, I think that that makes the most sense.

Ms. Stewart, any questions about my ruling?

MS. STEWART: This is Ladan Stewart from the SEC.

That makes good sense to us and we will certainly meet and confer and get back to the Court.

THE COURT: Mr. Rapawy?

MR. RAPAWY: Yes, your Honor. Given the primaries have you outlined, I agree. I would like to consult with my client certainly and it would be appropriate and convenient to get back to the court.

THE COURT: OK. Terrific. Here is what I am going to do. I am going to ask, given that this deposition may go forward on Monday, that the parties meet and confer this evening, tomorrow morning, and send me a letter by tomorrow afternoon to let me know what the plan is. You may choose to go forward with the deposition on Monday or you may choose to adjourn the deposition, I think for a brief period, and either try to reach a resolution among the parties about what questions would be permissible and what would be off limits, or to bring that issue to me so that I can give some rulings with parameters so that the parties know where I believe the privilege would be appropriately invoked.

So, I will just wait to hear back from the parties tomorrow.

MS. STEWART: Thank you, your Honor.

THE COURT: Thank you. Anything further, Ms. Stewart?

MS. STEWART: Not from me. Thank you.

THE COURT: Mr. Rapawy, is there anything further?

MR. RAPAWY: No, your Honor. Thank you, your Honor.

THE COURT: Yes. Who was that?

MS. ZORNBERG: Your Honor, this is Lisa Zornberg from

Debevoise & Plimpton. I didn't expect to be a speaker.

If you would permit, given what was just discussed about the meet and confer, I feel compelled, on behalf of Ripple, to bring to the Court's attention that after two trips to the Court already and two rulings by the Court to get internal memoranda of the SEC, we have learned very recently -- and we have been meeting and conferring with the SEC on this already and have reached a dead end on it -- the SEC informed us last week -- the SEC has not produced a single internal memoranda to defendants claiming that all of the responsive documents that were ordered under the Court's orders are being withheld for deliberative process privilege. I flag that for your Honor because we have been attempting, in the utmost good faith, to pierce the overbreadth of the deliberative process argument that the SEC has been advancing including counter to well-established law that even if you withhold opinions for deliberative process you can't withhold fact. The SEC confirmed again, at noon today, they are withholding every part of every responsive internal memoranda on deliberative process. They have produced not one and they don't plan to.

I raise this to the Court because, as part of that ongoing meet and confer, we think the SEC's position is untenable, it's way overbroad. We are preparing to take that very issue on deliberative process to your Honor because it is prejudicing Ripple and the individual defendants, this cloak of

deliberative process. And it is quite consistent with Ms. Stewart's statement on this call, oh, if you depose Mr. Hinman, we are going to say everything is covered by deliberative process.

So, I just want your Honor to be aware that there has been already multiple efforts by the defendants to bring the SEC to reason on this. We will meet and confer with them again to seek reason on this but the issues are of apiece which is that the SEC, in a very blanket way, is throwing deliberative process over everything that they don't want to share without drawing any finer lines that that. Hopefully, based on today's call, they'll come around to a different view but your Honor should not be surprised, if when we come back to the Court if the SEC remains as steadfast in this kind of blanket claim of deliberative process, then we will come back to the Court and will probably go beyond just the issue of Mr. Hinman's upcoming deposition.

MS. STEWART: Your Honor, this is Ladan Stewart.

THE COURT: Thank you.

MS. STEWART: If I may?

I disagree with much of what Ms. Zornberg just said with the exception that I agree with her that the privilege issues here are beyond Director Hinman's deposition. The parties are still in the process of exchanging privilege logs and have agreed to finalize that process by the end of next

week. And Ripple and the other defendants have already told us and they have now made very clear to your Honor that intend to challenge those assertions. So, it does make sense to do this all together as part of briefing before this Court. We will of course try to meet and confer ahead of time but I agree with Ms. Zornberg that this issue goes beyond Director Hinman, and perhaps what does make sense is for us to meet and confer and, if we can't, to propose a briefing schedule to your Honor for these issues to get briefed expeditiously.

THE COURT: I do think it makes sense to address all of this at once, I think that's most efficient thing, and I think it will also give me the most information. And so, I would urge the parties to try to address both the privilege log issues that Ms. Zornberg just raised, as well as the privilege issues that we have been discussing with respect to Mr. Hinman, and it may make sense to brief that in an expedited basis in order to get a ruling from me before the deposition of Mr. Hinman goes forward. Again, I'm going to leave that to the parties for meet and confer this evening and tomorrow morning and we will just look for a letter tomorrow afternoon, hopefully with an agreed upon plan going forward.

MR. FLUMENBAUM: Your Honor, this is Mr. Martin Flumenbaum.

The problem that I see with the procedure going forward is that, as I said, we can we can ask Mr. Hinman many

questions at his deposition on Monday about his communications with third-parties, both before his speech and after his speech. If the SEC is going to claim that third-party conversations with Mr. Hinman are covered by deliberative process, then we are never going to be able to go forth on Monday. So, maybe some guidance from your Honor -- I don't see how the deliberative process privilege can apply to third-party communications that Mr. Hinman had directly. So, my view would be if the SEC is going to maintain that that's covered by deliberative process privilege, then your Honor should rule on that right now because I don't see how it can possibly be covered by the deliberate process privilege.

THE COURT: For the sake of the court reporter, that was Mr. Flumenbaum.

UNIDENTIFIED SPEAKER: Um --

THE COURT: Hold on. Sorry. We are going to wrap up this conference.

I am going to request that the parties meet and confer on this issue. If Mr. Flumenbaum thinks that communications with third-parties are absolutely going to be fair game and he wants to go forward with the deposition because he thinks that there is no good faith privilege issue, you can put that in your letter to me tomorrow. And if you intend to go forward with the deposition on Monday, I will do my very best to get you a ruling on that particular issue.

It seems to me that the questions you are really interested in have to do with this speech and those are the ones where I think the deliberative process question is much more complicated. And so it may be easy for me to answer whether or not the fact that Mr. Hinman spoke with third-parties is or is not protected but this deposition is not about that and, in fact, if this deposition were just about those third-parties, I probably wouldn't authorize it because it probably would not fall within the exceptional circumstances category. What in my mind is exceptional, and why I am authorizing the deposition in the first place, is because of the nature and effect of the 2018 speech. That is what makes this deposition exceptional and that is why I am authorizing it. And so, it seems to me to press forward, because you are eager to hear who he spoke with, you may cut off your nose to spite your face.

MR. FLUMENBAUM: Well, I think third-party conversations would be relevant to the speech itself. For example, his meetings with the head of Ether a week before his speech I think would have great relevance to his speech. So, I look at it as part of this making the speech and reaching the conclusions he did.

THE COURT: Understood.

OK. So I will hear from the parties tomorrow afternoon.

MS. STEWART: Thank you, your Honor.

THE COURT: Thank you, everybody.

MR. RAPAWY: Thank you, your Honor.

MR. FLUMENBAUM: Thank you.

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